District 17, United Mine Workers of America *and* Phillip Lee White. Cases 9–CB–7767 and 9–CB–7805

December 19, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On April 28, 1994, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

In so doing, we note that in its exceptions, the Respondent also argues that the judge erred in failing to find the charge untimely in light of his finding that Charging Party Phillip White was or should have been aware of his improper seniority date over 2 years before the filing of the unfair labor practice charge. We find no merit in this exception. As noted by the Respondent, Section 10(b) is tolled until there is either actual or constructive notice of the alleged unfair labor practice. *Pinter Bros.*, 263 NLRB 723, 739 (1982). In the present case, the judge found that White knew or should have known of the seniority date assigned to him by his employer from the posted seniority lists. There is nothing on these seniority lists, however, to put White on notice of the Respondent Union's involvement in determining his seniority date, and it was not until August 1990, a date within the 10(b) period, when White attempted to file a grievance with the Respondent, that he learned that his seniority date resulted from an agreement between the Employer and the Respondent. Further, the statements made by Porter on August 16, September 7, and November 7, 1990, that White's seniority with Joshua did not begin until he became a member of the Union reaffirmed within the 10(b) period the Respondent's continued maintenance of the unlawful agreement regarding seniority. Accordingly, we find the limitations of Section 10(b) inapplicable in these circumstances.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, District 17, United Mine Workers of America, its officers, agents, successors, and representatives, shall take the action set forth in the Order.

---

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Member Cohen agrees, albeit for different reasons, that there is no 10(b) bar concerning the Respondent's discrimination against White. In this regard, Member Cohen notes that Respondent's agent, Atkins, told White, outside the 10(b) period, that he had to join the Respondent in order to date his seniority from his time of hire. Thereafter, but also outside the 10(b) period, White joined the Respondent. However, within the 10(b) period, the Respondent refused to accord White seniority from the time of his hire rather than from his joining Respondent. Yet, the Respondent accorded such seniority to a similarly situated employee. The difference between the two was that White did not join the Respondent when he was initially asked to do so, and the other employee did. This is, therefore, a case where Respondent has subjected an employee (White) to new and different discriminatory treatment within the 10(b) period. It is not a case where the discriminatory treatment occurred outside the 10(b) period and its effective consequences occurred within the 10(b) period, thus making the charge untimely. See *Postal Service Marina Center*, 271 NLRB 397, 399–400 (1984). Accordingly, White's charge was timely filed.

David L. Ness, Esq., for the General Counsel.
Charles F. Donnelly, Esq., of Charleston, West Virginia, and *Bradley J. Pyles, Esq. (Crandall & Pyles)*, of Logan, West Virginia, for Respondent District 17.
Mr. Phillip Lee White, of Peach Creek, West Virginia, appearing pro se.
Mr. Claude (Sam) Tiller, President, of Logan, West Virginia, for the Party-in-Interest.[1]

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was heard in Logan, West Virginia,[2] on a consolidated complaint issued pursuant to charges filed by Phillip Lee White, an individual[3] (White or the Charging Party). The complaint alleges that District 17, United Mine Workers of America (the Respondent Union or Respondent District) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act),[4] by maintaining an oral agreement with the Employer basing seniority upon duration of membership

---

[1] The caption was amended, sua sponte.

[2] The hearing in this matter closed at the start of my preemptive 13-month resident assignment to the U.S. Department of Commerce.

[3] The docket entries are as follows: The charges in Cases 9–CB–7767 and 9–CB–7805 were filed on November 16 and December 26, 1990, respectively. The complaint and consolidated complaints herein, respectively issued on December 28, 1990, and February 7, 1991, were amended at the hearing held on April 23 and 24 and October 27 and 28, 1992.

[4] By Order, dated July 7, 1992, Case 9–CA–28151 against Joshua Industries, Inc. (the Employer) was severed from Cases 9–CB–7767 and 9–CB–7805, considered here. My July 14, 1992 Decision in Case 9–CA–28151, issued in connection therewith, granting the General Counsel's Motion for Summary Judgment and finding that the Employer had violated Sec. 8(a)(1) and (3) of the Act was affirmed by the Board in its Order of August 20, 1992.

in the Respondent Union and by refusing for unlawful reasons to arbitrate White's grievance concerning his layoff. The complaint further alleges that the Respondent Union violated Section 8(b)(1)(A) of the Act by informing White that his aforesaid grievance lacked merit because his job seniority dated back only to when he became a member of the Respondent Union and by telling White that the Employer could lay him off for that reason. The Respondent District filed a timely answer to the complaint denying the commission of unfair labor practices.

I. JURISDICTION

The Employer, Joshua Industries, Inc., a corporation, during the times material, was engaged in the mining of coal in the vicinity of Logan County, West Virginia. During the 12-month period before issuance of the initial complaint, the Employer, in the course and conduct of its business operations, shipped from its Logan County facilities goods and materials valued in excess of $50,000 directly to W. P. Coal Co., a nonretail West Virginia enterprise which, in turn, annually sold and shipped products, goods, and materials valued in excess of $50,000 from its West Virginia facilities directly to points outside the State of West Virginia. The Employer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent District is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

The Employer, Joshua Industries, Inc., as contract miner for W. P. Coal Co., at peak, operated six coal mines employing 55 to 100 employees in Logan County, West Virginia. The Employer ceased doing business around January 28, 1991, and went into Chapter 7 bankruptcy proceedings. The events relevant to this matter involve the Employer's mines numbered 32 and 4 where White, the Charging Party, was successively employed. When active, these mines each employed around 18 to 20 workers.

Prior to June 1985, when it and certain other mines were taken over by CB&T Holding Company, #32 mine had been owned by John Motton and Phil Nelson. With the arrival of CB&T, Vernon Bender, who had been a section boss with the predecessors, became mine superintendent principally responsible for operating #32 mine. Bender, who originally owned a 10-percent interest in CB&T, also became a director of that company. Although Bender resigned as director on May 20, 1988, he continued as mine superintendent until July of that year when Claude (Sam) Tiller Jr. assumed active operation of that mine. Tiller, who had held a 39-percent ownership interest in CB&T at the takeover, then became sole owner.

The classified employees[5] at the #32 mine, and later at #4 mine, at all relevant times, were covered by the National Bituminous Coal Wage Agreement of 1988 (the BCOA contract or collective-bargaining agreement), between the Bituminous Coal Operators' Association, Inc. (BCOA), and the United Mine Workers of America (UMWA). This contract was administered for the UMWA in Logan County by its District 17, Subdistrict 3, which, in turn, designated Local 5921 to oversee the contract at #32 mine and to process the first two steps of the grievance procedure. All third-step procedures and arbitration were to be undertaken by the Respondent District through its field representatives.

In provisions most relevant to this proceeding, the BCOA contract, in effect, established two types of seniority—company seniority, based on the employee's original date of hire and mine seniority, dating to when the employee began work at the mine where employed. Under contract article XVII, in the event of layoff or work force realignment, mine, rather than company, seniority prevailed and employees with the most seniority at the mines where the layoffs or realignments occurred who had the ability to perform the available work would be the last to be laid-off and the first to be recalled from the panels. Panels were listings of the names of laid off employees and were used for recall.[6] Company seniority was applicable in determining employee eligibility for benefits such as graduated vacations (art. XIV), first choice in determining vacation scheduling conflicts (art. XIII, sec. c), and extent of sickness and accident benefits (art. XI).

Article XXIII of the BCOA contract, entitled *Settlement of Disputes*, at section c, set forth a three-step grievance procedure leading, at the fourth step, to possible arbitration. Strict time controls were incorporated into every step of this process. At the first step, the employee was required to make his complaint to his immediate foreman, authorized to settle the matter. The foreman was obliged to notify the employee of his decision within 24 hours following the day when the complaint was made. If no agreement was reached, under step 2, the complaint had to be submitted on the BCOA–UMWA standard grievance form and to be taken up by the mine committee[7] and mine management within 5 working days of the foreman's decision. Within the 5 working days after the complaint reached them, the mine committee and management were to complete the standard grievance form and, if the complaint was not settled, the grievance was to be referred to a representative of the UMWA district, designated by the Union, and an employer's representative. Within 7 working days after such referral of the grievance to them, the district and employer's representatives, neither of whom to be eligible could have participated in the first

[5] Classified or bargaining unit employees were those working in job classifications listed in appendix B to the National Bituminous Coal Wage Agreement of 1988, infra.

[6] At time of layoff, employees were expected to complete panel forms listing the types of work they had performed or believed themselves capable of doing, as incentive to recall.

[7] Under contract art. XXIII, sec. a, the mine committee, consisting of three to five actively employed employees elected by the employees at such mine, were authorized to adjust disputes arising under the contract at steps 1 and 2. They had authority, on the grievant's behalf, to settle or withdraw any grievances, or to forward the grievance to the District for step-three processing, possibly followed by arbitration.

two steps, were obliged to meet at step 3 to review and attempt to resolve the grievance. Within 10 days after the step-three grievance was referred to them, in the absence of agreement, the grievance had to be referred by the representatives of the district and employer to the appropriate district arbitrator. The arbitrator's hearing, in turn, was mandatorily conducted not more than 15 days after referral of the grievance. Most significantly, and consistent with the other time frame, section d, entitled *Ten Day Limitation* and relating to the initiation of grievances, was as follows:

> Any grievance which is not filed by the aggrieved party within ten (10) working days of the time when the Employee reasonably should have known it, shall be denied as untimely and not processed further.

The contract also provided for union security (art. I).

Other contract provisions established hourly and daily pay rates for the various job classifications (appendix A), prohibited supervisors from performing classified work, except as necessary for training and instructing classified employees (art. I, sec. c) and provided for additional employee benefits, including pensions and health insurance.

Roger Caldwell was the District 17 executive board member and manager of its Subdistrict 3 office in Logan, West Virginia. Harold Porter was a District 17 field representative at the Subdistrict 3 office, who reported to Caldwell.

2. The alleged discrimination against Phillip Lee White

a. *The parties' positions*

The General Counsel argues that the Respondent District refused to take to arbitration White's grievance concerning his layoff because White who, while with Joshua Industries, always had performed contract—classified or unit work had been compelled over his objection to join the Union and to come under the coverage of the collective-bargaining agreement 7 years after he had become employed by the Employer. This layoff occurred in disregard of White's seniority as, perhaps, the classified employee with the longest continuous company service. White had been reluctant to join the Union because in his original salaried employee status, his earnings greatly exceeded what he could realize from doing the same work under the hourly contract rate. The General Counsel asserts that the Respondent Union, because of White's reluctance, had treated him differently than other employees, including other initially salaried employees also brought into the Union but who had joined more willingly. Accordingly, pursuant to an alleged oral agreement between the Respondent District and Joshua Industries, White was accorded company seniority only from when he became a member of the Union, instead of from 7 years before, when first employed by the Employer. This reduction in White's seniority, which also proceeded in violation of an agreement between officers of the UMWA local union and the Employer intended to protect White's seniority, resulted in his layoff when others, who had not been employed as long, continued to work. The General Counsel also asserts that White, on several occasions, was unlawfully told by the District's field representative that, because his seniority did not begin until he became a union member, he was subject to layoff.

The Respondent Union denies the asserted discriminatory treatment and argues that White's seniority had been determined by the Employer, with no input from the Union and that, contrary to the General Counsel, District Field Representative Harold Porter had taken virtually every available measure, including extensive research and consultation, to fairly represent White in processing his grievance. However, the matter could not be successfully arbitrated or pursued beyond the third step because untimely filed. Both the Respondent District and the Company contend that White should have initiated the grievance within the above contractually specified 10 working day period, because he had or should have had sufficient prior notice that his seniority was in dispute. The Respondent District further denies that any of its officials had expressed or effectuated a practice linking White's seniority to when he joined the Union or that there had been any agreement known to the Respondent District relating White's seniority to date of hire when he was brought into union membership. Finally, the Respondent District, asserting the autonomy of its local unions, denies that any connection between District 17 and subordinate locals was sufficient to warrant that it be bound by the testimony of General Counsel's witness, Jimmy Adkins, financial secretary-treasurer of its Local 5921.

b. *The General Counsel's evidence*

(1) The agreement concerning White's seniority

On February 10, 1988, Sesco Sias and Jimmy Adkins, respectively president and financial secretary-treasurer of Local 5921, UMWA,[8] which then represented all of Joshua's classified employees, met with Joshua's then-mine superintendent, Vernon Bender. Sias and Adkins presented a written grievance that the Employer had violated the contract by not establishing the electricians as classified employees covered by the contract. As described by Adkins and Bender, Bender agreed to put the salaried certified electricians who, as charged, were doing classified work, in the Union but asked that the electricians be allowed to keep their dates of hire as their seniority dates. The union representatives replied that they would have to go to the District to get everything approved. They promised to get back to Bender on this matter.

Two days later, Sias and Adkins brought to Bender a typed settlement agreement, dated February 12, pursuant to which the Company agreed to immediately place the electricians in the Union as classified employees covered by the contract. To remedy the grievance, the Employer further agreed that those employees' seniority dates would be established by their hire-in dates. Bender and Sias signed the settlement. Adkins testified that, at that meeting, he also stated that he knew that Bender had one other salaried man who was doing classified work running a continuous miner but who was not in the Union. When Bender asked if he was referring to Phillip White, Adkins confirmed that he was. Adkins asked whether Bender would be willing to tell White to join the Union or whether he would have to file another

[8] Sias had served as Local 5921 president for 17 years prior to his retirement, while Adkins, employed by W. P. Coal Company for approximately 14 years as an electrician, had been in his local union office for about 5 years at the time of the hearing.

grievance.[9] Adkins and Bender agreed that Bender had replied that there was no need to file a grievance. He asked only that White be given his date of hire as his seniority date as was done for the electricians. Sias and Adkins agreed to this.

Adkins testified that 2 to 3 weeks after the Union's February 21 meeting, where the electricians had joined the Union but which White did not attend, he went back to see Bender. The latter assured Adkins that he had spoken to White about joining the Union. Bender promised Adkins that he would speak to White again and would get him to affiliate.

White, in turn, testified that when Bender told him that he would have to join the Union, he asked why. Bender answered that ''they are making you join'' and instructed him to be at the Union's next meeting. White asked if anyone could take his job away and was reassured that he was the oldest (longest serving) man on the property and, seniority-wise, his job could not be taken away.

Adkins related that, in this period, White had approached him at the W. P. Coal mine where Adkins was employed asking why the Union was after him to join. Adkins explained that White was doing classified work and would have to join the Union or be subject to a grievance filed by someone from the panel. White was told that he later might lose his job and that he would have to decide what he was going to do. Responding to White's question about his seniority, Adkins told him that Sias and he had agreed with Bender that if White would join the Union, he would be given his hire date as his seniority date.

According to Adkins, White thereafter first attended a union meeting in April 1988, but did not start paying dues until June of that year, when he also began to receive contract benefits.

Bender explained that when CB&T assumed control of Joshua, pursuant to an unwritten arrangement inherited from the prior owners, the new owners continued to pay certain employees, including White, salaries that were substantially higher than the contract hourly rates. For example, working the same 58-hour week averaged by White, an employee doing comparably paid work at the base contract rate of $16.32/hour would have earned between $52–56,000/year. In comparison, White, working the same hours at salary and operating the same equipment, had received $72,000/year. White, in addition to salary, also earned a 25-cent, and later, a 50-cent/ton, production tonnage bonus. While recognizing that it would have been possible to save about $20,000 annually in White's case alone by having placed him under the contract from the start, Bender testified that he had not done so because he worked mines on a production basis and wanted tonnage. Because White and other salaried employees were not under the contract, Bender could work them longer hours than the prescribed basic 8-hour day, establishing five 10-hour and one 8-hour weekly work shifts without discussion. Bender also worked White during many Sundays. Often, only Bender and White were at work on Sundays. While the contract prohibited supervisors from performing classified work, Bender admitted that he had violated that provision as well as the contractual union-security and wage provisos. Bender further explained that he also had paid the salaried people more than they otherwise would have earned because it was advantageous for him to have employees he could call in to work during emergencies, when union employees would not be available.

Bender related that White's more costly salary had been paid for by the Company's benefit and not because White had had any special authority or function. White's continuous miner operator position always had been classified under the contract. White, for his part, had found the higher salary to be beneficial even though he had put in more worktime than otherwise and had received none of the contract benefits except vacations. As a result, White had to be compelled to join the Union 7 years after starting as a salaried employee, and did so only after being reassured by the Company and local union representatives that his job would be protected by preserved retroactive seniority.

Although White had worked many weekends, had frequently checked to see if Saturday work was posted, and regularly had seen mine permits and other data affixed to the #32 mine bulletin board, he denied that he ever saw a posted seniority list either at #32 mine during the years he had worked there, or at #4 mine where he and others were transferred after #32 mine was closed. Bender confirmed that during his tenure, which ended in July 1988, seniority lists had not been posted but kept in company office desk drawers.

(2) White's layoff from the #4 mine

The record shows that Phillip White's mine seniority date at the #4 mine was recorded as March 23, 1990, when he began to work at that facility after a brief layoff following the end of his years-long assignment at #32 mine. The #32 mine ceased being operational on January 28, 1990. White was one of the last to leave #32 mine, having been involved in the ''pillaring out'' operation, a method for maximizing coal extraction from mines being closed by continuing to mine during a gradual retreat towards the exit. During this process, the equipment and support structures are gradually removed.

Jimmy Adkins, without contradiction, described a February 20, 1990 third-step meeting he had attended concerning a grievance filed by Johnny Williams, an employee and mine committeeman at #32 mine. This grievance, in relevant part, protested that the Company, in violation of the contract, had not been laying off employees from #32 mine according to seniority. The meeting, held at the offices of Logan Hydraulics, Logan, West Virginia, another company wholly owned by Joshua's proprietor, Sam Tiller, also was attended by Tiller; Tim Taylor, Joshua's office and business manager; Harold Porter, the Respondent District 17 field representative; the grievant, Williams; Williams' comine committeeman at #32 mine, Allen Adkins, who also was Jimmy Adkins' brother; and by four–five employees who had been laid off at #32 mine. Jimmy Adkins related that, to resolve this grievance, the Company agreed that it would fill the available jobs at #4 mine, then opening, with the employees still left at #32 mine. Once at #4 mine, the employees would regain their mine seniority retroactive to the first day of #4 mine's operation. When one employee asked what would happen in the event of layoff, since they all would have the same mine seniority at #4 mine, Porter responded that, if there was a lay-

[9] Adkins had learned of White's status from his brother, Allen Dean Adkins, then a mine committeeman employed with White at the #32 mine.

off, ''it would go back to company seniority.''[10] In settling Williams' grievance, the Company agreed to cooperate fully with the joint panel custodian (the local union's recording secretary) in regard to all provisions of the 1988 collective-bargaining agreement and also agreed to comply with article XVII, section k, of the contract.[11]

Allen D. Adkins,[12] testified that 1 or 2 days before White's August 12, 1990 layoff, he was present at a meeting in Tiller's Logan Hydraulics office called to discuss impending layoffs.[13] That session also was attended by Tiller, Mine Superintendent Harold Robertson, District 17 Field Representative Harold Porter, and the mine committee. At that meeting, Robertson announced that #4 mine employees Walter Marcum Jr., and Dave Farley were going to be laid off and that Phillip White would be included in the layoff because of his seniority date. Adkins asked why they were going to lay off Phillip White and not lay off John Boling.[14] The company representatives replied that they were going to let Boling keep his hire-in date with the Company as his union date, but that they were not going to let White do so because Phillip had been made to ''come and join the Union and John Boling done it voluntarily.'' According to Allen Adkins, the Company was going to use the date that White had joined the Union as his seniority date instead of the date when he had begun to work for the Company. Porter agreed to this, also noting that White had been made to join the Union while Boling had ''come down voluntarily.'' Adkins retorted that he did not feel it right that they had kept John Boling when his hire date was '85 and Phillip's was sometime back in the early '80s. White should have been ''older (had greater seniority).'' When the company representatives asked what they would have to do to lay off White, he told them that if they were going to let White go by the day he joined the Union instead of his hire-in date, they would have to lay off everyone younger than him to get to him. Robertson replied that they would lay off anyone they had to to get to White. However, by the time Robertson had made this last statement, Porter already had left the meeting.

Allen Adkins related that he again spoke to Porter in the change room in the trailer near the company office at #4 mine only minutes before the August 12 layoffs were announced. Adkins told Porter that he thought it was awfully dirty of him to let the Company lay off Phillip White when he was the oldest man with the Company, while keeping John Boling who, in Adkins' view, was real close to being the youngest man, Porter answered that Phillip had been made to join the Union and Boling had joined voluntarily. Adkins responded that it did not make any difference whether White had been made to join the Union, or not; both men had joined under the electricians agreement. Porter replied that he didn't care; that was the way it was going to be.[15] The Company's parts purchaser, Sam Belcher, then came out of the office and announced that White, Farley, and Marcum were being laid off. Boling, then employed as a roof bolter operator, as noted, was not laid off. White's written layoff notice set forth that the action had been taken for economic reasons.

In accordance with regular procedures, White, when notified of his layoff, completed for recall purposes a standardized panel form listing his previous mining experience with other employers and showing 14 job classifications, including roof bolter operator (Boling's classification at the time), and roof bolter helper. In so doing, White indicated that he had the ability to perform these jobs and wished to be recalled to any of them.

[10] Jimmy Adkins had had no official status at the February 1990 third-step meeting because the employees, in transferring to #4 mine, had gone into a different UMWA local. Nonetheless, he was requested to attend by the affected employees whom he and Sias formerly had represented.

[11] Art. XVII, sec. k, concerning transfer to other mines of the same employer, provided, in relevant part, that when there was mine closure or a reduction in force, employees who requested that their names be placed on the panel of that mine would be transferred to the mine where work was available in accordance with their position on the former mine's panel list, but their seniority at the mine to which they were being transferred would not begin until the date they actually started work at the new mine. However, an exception to that seniority rule at the new mine was germane to White in that employees who were required to remain at the mine that was being abandoned to assist in the closing or dismantling work, would have the right to transfer later with seniority retroactive to the date when they would have been transferred had they not been required to remain at the discontinued mine. Because White had been assigned to assist in ''pillaring out'' #32 mine, under the contract, he was entitled to an earlier mine seniority date at #4 mine.

[12] Allen Adkins, previously identified as Jimmy Adkins' brother, worked for Joshua from January 1986 to June 15, 1990, when he left because of an injury. During that period, he worked successively at mines #32 and #4, serving as a member of the mine committees at both mines, and on the safety committee at #32 mine. Allen Adkins was obliged to relinquish his place on the #4 mine committee in July 1990 because no longer employed.

[13] Under art. XVII, sec. c, of the BCOA contract, the Company was required to meet with the local mine committee 24 hours before implementing layoffs. Although Allen Adkins no longer was a member of the mine committee, he had been asked to attend the August 10 meeting by mine committeeman, Johnny Williams.

[14] Boling, originally hired on July 1, 1985, as a salaried outside man by his brother-in-law, Bender, was brought into the Union together with James K. Castle, another salaried outside man, by an April 4, 1989 settlement agreement signed by Tiller and Local 5921 president, Sias. This agreement, which resolved a grievance, provided that the seniority dates of Boling and Castle ''shall be established by their hire-in dates (07–1–85 and 6–15–85, respectively), and that all future hiring of classified employees will be conducted according to the terms of the 1988 National Bituminous Wage Agreement.'' Outside men performed classified work that did not require that they enter the mines. As a result of this agreement, Boling, with a protected 1985 seniority date, continued to work at #4 mine after White, with a 1981 original date of hire, was laid off. By the time of White's August 1990 layoff, Castle, also a subject of the April 1989 settlement agreement, no longer was employed.

[15] Shortly before the hearing in this matter opened, Allen Adkins had taken actions critical of Porter for reasons unrelated to Phillip White. On March 5, 1992, Adkins had sponsored a letter, also signed by other laid-off Joshua employees, denouncing the way Porter and other union officials had handled a filed grievance protesting that company supervisors were ''running coal'' after employees had been let go, and by the employees' premature loss of insurance coverage. Also, on March 13, a week later, Allen Adkins had written a letter of complaint about Porter to Roger Caldwell, Porter's superior at the Respondent Union.

(3) The grievance concerning White's layoff

Phillip White and his brother, Billy Edward White,[16] testified that on August 16 they went together to the District 17, Subdistrict 3, office in Logan to file Phillip White's grievance regarding his layoff. When the brothers arrived at the union hall, they immediately went to Field Representative Harold Porter's office. Acting as spokesman, Billy White told Porter that ''they'' were doing Phillip White wrong by laying him off when he was supposed to be the oldest man there and that they needed to talk to somebody about a grievance. Porter asked Phillip White when he had joined the Union. Phillip White replied that he thought it had been in June 1988. Porter told him that his seniority would count from the time he joined the Union and started paying union dues. Porter told Phillip White that if he thought he had a case, he should file a grievance. Phillip White could not recall whether Porter had handed him blank grievance forms at the time.

The White brothers then went to the office of Field Representative Bill Hall who filled out the grievance form for Phillip White on the basis of what White told him.[17] The grievance text was as follows:

> In a realinement [sic], I was laid off and I had mine seniority *at the mine*, and for that reason I feel that I have been done wrong and for that reason I feel that I should be put back to work with all back pay and benefits I lost under the 1988 National Bituminous Coal Wage Agreement. [Emphasis added.]

After filing his grievance, White called Jimmy Adkins, telling him that he had been laid off, having been given a June 1988 seniority date from when he had joined the Union. White told Adkins that he had explained to the Company that he was supposed to have had the same arrangement as the electricians—to keep his date of hire as his seniority date. However, the Company had not been able to find written corroboration of such an understanding and the June 1988 date was what they had had to go by in laying him off. White, according to Adkins, then asked if Adkins remembered what had happened during the meeting between himself, Sias, and Bender when the grievance settlement concerning the electricians was reached. When Adkins said that he did, White asked Adkins to put an account of that meeting in writing so that he could get back his seniority.

Accordingly, Jimmy Adkins had typed a description of that meeting with Bender and Adkins signed it on August 20, 1990. This account spelled out the details of the February 1988 meetings with Bender, as described above, where the grievance concerning the electricians had been resolved; where it had been orally agreed that White would join the local union; and where, at Bender's request, the local union also had concurred that White be given the same rights to his seniority as had the electricians. While Adkins' prepared account also was signed by Bender sometime before the start of the hearing in this matter, it is not clear just when Bender actually did sign that document. I find that Bender had not signed the document when it later was shown to Porter in support of White's layoff grievance. See, infra.

Phillip White testified that he next met with Porter on about September 5, 1990, when he and Billy White returned to the union hall. In Porter's office, Phillip White told him that he had a letter concerning his seniority at Joshua. Porter read the typed account and declared that it was not true; White's name was not with the electricians. White replied that it was true because Bender and Adkins had signed their names to it.[18] Porter then picked up the grievance and told Phillip White that he thought it had been written wrong in that he had written ''at the mine'' on it and that White needed to file a new grievance. White refused, insisting that the grievance had been written ''right.'' Porter then called Tiller and announced that they had to hold a meeting concerning White's grievance. The White brothers then left.

Billy White recalled only that shortly before the start of the September 7, 1990 third-step meeting on his brother's grievance, he had accompanied his brother to the Subdistrict 3 office where Porter, after reading the account, stated that Phillip White's time with Joshua Coal Company did not start until he joined the Union.

(4) The third-step grievance meeting

Combining, in part, the testimony of Phillip White and Jimmy Adkins,[19] on September 7, 1990, both men attended the third-step meeting concerning White's grievance in Tiller's office at Logan Hydraulics. Also present were Tiller and Taylor for the Company and Porter for the Respondent District. At the outset, Porter announced that they were there on the last step of Phillip White's grievance, which Porter produced from his briefcase and read aloud. Porter then asked White to explain what he was asking for in his grievance. White replied that he thought that he had been wronged in that he had not been given his rightful seniority date and had been laid off. He was asking that his job be given back to him. At Porter's invitation to state the Company's side, Tiller, in effect, declared that the Company had had nothing in writing showing that White had been given the same seniority agreement as were the electricians and the only thing that Tiller had to go by was when White had started to pay dues at the time he joined the Union. Taylor then showed Porter a copy of the relevant monthly dues list indicating the employees who paid monthly dues. After looking at this list, Porter asked White when he had joined the Union. White responded that he had joined the Union and was supposed to have gotten the same agreement as the electricians. Accordingly, he should have been allowed to keep

[16] Billy White, long active in the Union, had worked for Joshua from about 1984 until 1987, when he became employed by a different employer. He left the coal industry in 1989 because of an injury.

[17] Phillip White, who had met Porter for the first time on August 16, did not confirm Billy White's testimony that they had gone to Hall's office because Phillip White did not trust Porter.

[18] Phillip White conceded on cross-examination that when he presented the typed account to Porter, Bender had not yet signed it.

[19] Since White, by the time of the September 7 meeting, was a member of Local 9553, UMWA, Adkins, who had remained an officer of sister Local 5921, was at that session at White's request as a friend rather than in his official representative capacity. Allen Adkins, unlike his brother, Jimmy Adkins, did not become substantively involved with White's grievance. Billy White did not attend the September 7 meeting.

his hire-in date as his seniority date.[20] When Porter asked why White had not joined the Union when the electricians did, Adkins answered at White's request. Adkins stated that, in order to get White to join the Union, he had had to go back to Bender a second time to check whether he had told White about their agreement, and that White thereafter had joined. Adkins also explained how it had come about that White was given the same agreement as had the electricians. When he and Sias had gotten Bender to sign the agreement concerning the electricians, they also had spoken to him about White. All had agreed to give White his hire-in date as his seniority date, as they had done for the electricians. Porter responded that he had sat in on most of the negotiations concerning the electricians and the people who were not classified, but never had seen White's name on any document that would have allowed him to keep his date of hire as his seniority date. Adkins explained that White's name had not been put in any written agreement concerning seniority, including those relating to the electricians and Boling, because it was not necessary; Bender had agreed to put White into the Union with no need to file a grievance. By contrast, the statuses of the electricians, Boling, and Castle, were resolved only after written grievances were filed.

As White recalled the September 7 meeting, Tiller had asked if White's name was with the electricians. When Porter said no, Tiller declared that White did not have a leg to stand on. It was then that Adkins had interjected that the reason why White's name was not with the electricians was that the Union had not had to file a grievance about White to get him to join the Union. Taylor then declared that he could remember a time when Phillip White had said, while he and Bender were in the office, that no one could make him join the Union. Porter declared that White's seniority should be from the date he joined the Union. When Porter asked Tiller for the seniority list, it was produced and examined. Tiller told Porter that White's seniority would be as of 1988 because that was when he had joined the Union. Porter replied that they would have to take this to the next step. The meeting, which had lasted for about 25 minutes, then ended.

After the meeting, Adkins and White spoke briefly with Porter. Adkins testified that he asked Porter not to withdraw the grievance. Porter said that he would take it back to the screening committee[21] which would decide if the case had enough merit to go to arbitration. White, in turn, asked if Roy Blankenship, another field representative, still was handling his case. Porter replied that Blankenship probably was tied up at the office. The grievance would go over there and, if Porter's boss (District 17 Executive Committee Member Roger Caldwell) saw fit, it would be arbitrated. White testified that Porter did not then state his feelings about the case, whether he saw any problems, or announce that the grievance would not be further processed.

(5) The refusal to arbitrate White's grievance

Billy White testified that, although he had not met Roger Caldwell, he called Caldwell on the morning of Wednesday, November 7, 1990, asking when his brother's grievance was going to be arbitrated. Caldwell, according to White, replied that that hearing was going to be on Friday. Billy White then called Phillip White and told him that they had to go to the hall to find out what time they were going to arbitrate the grievance so that Phillip White could be there. When the brothers arrived at the hall, they immediately went to see Caldwell who referred them to Porter. Accordingly, they proceeded to Porter's office. When Billy White asked when his brother's grievance would be arbitrated, Porter replied that the Union was not going to arbitrate it. Asked why, Porter replied that it was because White did not have sufficient evidence, that White's time did not start until he had joined the Union, and that he had not joined the Union in the time required under the 1988 agreement. Porter informed them that he had written a letter to Phillip White stating that the Union was not going to arbitrate his case and that he could get a copy from the lady downstairs. The White brothers then obtained a copy of the letter and left. This letter, dated November 7, in relevant part, was as follows:

> The grievance has been carefully investigated and considered. It appears that there is insufficient evidence of a violation. Therefore, the grievance will not be processed further.

Billy White testified that 3–4 days after the November 7 conversation with Porter, he encountered Porter in the parking lot of a Logan hardware store. Billy White again asked why Porter was not going to arbitrate Phillip White's case. He was the oldest man up there and it wasn't right. After Porter responded that Phillip White had not joined the Union until 1988, Billy White responded that even if he had not joined, if he had been dragged, Phillip White still had as many rights as anyone else in the Union and that Billy White thought that the Union should arbitrate his case. Billy White noted that ''they'' had kept John Boling who had joined the Union after Phillip, and that Phillip White had come to the mines before 8 or 10 guys who had been left ''up there (left on the job).'' Phillip White had mine seniority and company seniority both, plus union seniority over some of them. Porter reiterated that the Union was not going to arbitrate Phillip White's case; they could not win it.

[20] After initially testifying to the contrary, White, on cross-examination, agreed with the other witnesses to the September 7 meeting that the signed account of the February 1988 sessions between Jimmy Adkins, Sias, and Bender was not produced or discussed on that occasion.

[21] The screening committee consisted of the District 17 executive board members who, respectively, directed the District's four subdistrict offices in West Virginia. Highly experienced in arbitration, these senior union officials, sitting as a panel, would hear arguments for each side of cases potentially marked for arbitration, presented by the responsible field representatives, and would make nonbinding recommendations as to whether the discussed cases should be arbitrated. Drawing on their backgrounds, the screening committee also could suggest to the field representatives research precedents, materials, and procedural approaches. The UMWA found the screening committees to be particularly useful in avoiding costly rearbitration of issues that had not been successfully arbitrated elsewhere in the past. Although screening committee recommendations as to arbitrability were described as ''non-binding,'' since all of the Respondent's District's field representatives worked for one or another of the committee members, it is hard to envision nonacceptance.

c. *The Respondent District's evidence*

The Respondent Union, with some corroboration from the Company, has broadly disputed the General Counsel's factual presentation.

(1) Porter's testimony

Field Representative Porter denied having participated in either of the two August 1990 conversations described by Allen Adkins, and he and Company President Tiller both denied having heard or agreed with the statement attributed to Mine Superintendent Robertson to the effect that ''we'll do whatever we have to to get to Phillip White.'' Porter concurred with Tiller's testimony that the Union had had no input concerning Tiller's decision to institute the layoff and that there had been no prior discussions between Tiller and anyone from District 17, including Porter, concerning White before White filed his grievance.

Porter testified that he first met Phillip White when he came to Porter's office in August 1990 to file his grievance. Prior to that, he had not heard of Phillip White, although he had known Billy White as a mine committeeman at another mine. Billy White had entered Porter's office with Phillip White and told Porter that he was there to introduce his brother and to see what the Union could do. He announced that the Company had done Phillip White wrong. Porter replied that if they felt that the Company had done Phillip White wrong, they should file a grievance as soon as possible and not fool around on the time so that the Union could get it processed and heard. While Phillip White tried to tell Porter that he ''had been laid off wrong,'' Porter could not then judge the merits of the complaint. He simply handed Phillip White a blank standardized grievance form.

Since, as noted, under the established procedures, all grievances were processed through the first two steps at the local union level with the assistance of local officials, Porter did not encounter White's grievance until it came to him at the third step. Porter and Phillip White then discussed the matter. Porter noted confusion in that, while White was telling him that he should have his seniority from 1980, his grievance was so written as to limit his request to more recent mine seniority. Porter, therefore, suggested that White rewrite the grievance to show that his claim was not for mine seniority but for company seniority going back to his date of hire. He merely had advised that White amend the grievance to more clearly specify his request. This was because, in Porter's experience, arbitrators permitted only the issues as framed in the grievance to be arbitrated and refused to go in other directions. Phillip White declined to modify his grievance. Porter denied that at any time before the step-three meeting concerning White's grievance, did either Phillip or Billy White say anything to him to the effect that the Company had agreed to let Phillip White keep his hire-in date as his seniority date, or about the relative seniority of Phillip White and John Boling. Following the above discussion, Porter called the Company's business manager, Tim Taylor, and scheduled a third-step meeting with the Company on the grievance.

Porter testified that at the September 7 third-step meeting, with the above-identified persons present, he read the grievance aloud and invited Phillip White to state his complaint. White declared that he felt that he had been done wrong by the Company in that his seniority, as had been the case with the electricians, should go back to 1979 or 1980, when he first began to work for the Company. Tiller then told White that he had been hired as a salaried employee and had continued as such until June 1988 when he had become a classified employee working under the terms of the contract. Tiller declared that the grievance was untimely filed, very untimely, and that the Company did not want to further process the grievance because of the 10-day limitations bar in the collective-bargaining agreement, cited above, which provided that any grievance which was not filed by an aggrieved party within 10 working days of the time when the employee reasonably should have known it, shall be denied as untimely. Tiller told White that he had known that his seniority standing with the Company was as of July 1988. The seniority list reflecting this had been posted on the bulletin board at #32 mine and White never had complained about what was shown. When, later, White was transferred to #4 mine, the seniority list showing his attributed seniority date also had been posted on the bulletin board. Again, White never had objected to the seniority date shown or filed a grievance to have it changed. At the third-step meeting, White did not deny or seek to rebut his seniority standing as shown on those lists.

Porter averred that after raising the timeliness issue, the Company, at his demand, produced the two lists showing the employees' seniority dates. The lists presented were dated July 29, 1988, and June 19, 1990, and, assertedly, had been posted, respectively, at mines #32 and #4. The latter had been put up after the employees were moved there from #32 mine. After this, the union side, including White, caucused and discussed why no timely grievance had been filed to protest Phillip White's standing on the posted seniority lists and White's failure to produce any witnesses to support his claim.[22] Porter explained the seriousness of having allowed these lists to have been posted all that time without protest of any kind. He pointed out that the Company, in fact, had been transferring and assigning employees from one mine to another in accordance with these lists, that there was a serious problem with the timeliness of the case, and that there also were serious doubts as to the merits of his grievance as written. Jimmy Adkins asked only if Porter, rather than dropping the case, would take it up to the screening committee. Porter answered that he would do so as a courtesy to Adkins and that he would further investigate the grievance. When they returned to the meeting, Porter told the company representatives that the Union had a problem. He requested and received waiver of the contractual requirement that grievances, after third-step action, be referred to arbitration within 10 days, because of the amount of research he would have to do. Also, screening committee action would take more than 10 days.

Porter averred that after he had shown White and Adkins the two seniority lists produced by the Company, neither man stated that the Company had agreed to allow White to keep his original hire date as his seniority date. That point

[22] Porter testified that he had called White before the September 7 meeting, telling White that evidence would be needed at the third-step meeting to substantiate White's position. Accordingly, Porter had advised in advance that White bring in all his witnesses, supporting documents—anything in his possession that might be helpful to his case.

was not made by anyone else at the meeting. The seniority lists were the only documents produced at the session and, contrary to Jimmy Adkins, no dues report was presented. Porter testified that there was no discussion at the September 7 meeting concerning when White had become a union member; that point not being an issue in the grievance. When the lists were produced, he had told White, here are the lists, what do you have to say about them? White merely had shrugged. He did not deny having previously seen the lists.[23]

After the September 7 meeting, Porter did extensive research on White's grievance. He spoke to the Union's contract administration department in Washington, DC, consulted with his supervisor and other field representatives, and went through the entire computerized indexing system on grievances, principally to determine whether there was any way around the 10 working day limitation period for the timely filing of grievances. According to Porter, it was undisputed at the step-three meeting that the seniority lists had been posted on the respective mines' bulletin boards and the issue confronting him was how to evade the time frame. In this regard, Porter related that, since the contract language incorporated all prior decisions of the arbitration review board and field decisions, even those arising under earlier contracts, he had reviewed those, too. In his continuing effort to get around the 10-day rule, he narrowed several thousand arbitration decisions on the computer to about 25. As examples of this research, Porter identified two arbitration decisions which were made part of the record of this proceeding. However, Porter could find no exception for Phillip White.

Even after doing the above-described research, including consultation with colleagues and submission to the screening committee, which had advised against arbitration, Porter still needed to talk to Phillip White. On an unrecalled date sometime between the September 7 meeting and the November 7 letter, advising White that his grievance would not be arbitrated, Porter called White, telling him that he was investigating his case and that he needed to know how the Company had treated White since he had been employed there. He asked if White's pay stubs would show that the Company had withheld any union dues on him and if his wage rates and benefits were in accordance with the contract. Porter also asked for any reports that White might have from the health and retirement funds that would show credited times for those benefits. White replied that he had been hired as a salaried employee and paid a base salary, that he had not paid any union dues, and that his pay stubs, in effect, would not yield any helpful information. Porter testified even though White should have been able, at that time, to have provided evidence of dues paid since at least June 1988, if White had such information, he did not give it to Porter.

Porter recalled that at some time after the September 7 meeting, Phillip White and Billy White first brought to his office the aforesaid account of the February 1988 meetings describing how the electricians and White had been into the Union. He told the White brothers that he would check into that document as part of his investigation. Accordingly, Porter thereafter contacted Local Union President Sias, who told him that he had not made or known of any such agreement concerning White.[24] Since the document signed by Adkins and Bender was the only evidence that White had supplied in support of his case, and that had been refuted by Sias, who also was supposed to be a party to the understanding, Porter opined that it would not provide sufficient basis to go forward.

Porter attested that, on or about November 7, 1990, he concluded that Phillip White's grievance would be lost if arbitrated. Therefore, when Phillip White came unannounced to his office on that date, he responded to White's queries by telling White that he had finished the investigation and had decided, from the evidence and involved circumstances, that he was not going to go forward. A letter to that effect would be sent to White. Porter explained to White that the Union had had a problem with White's seniority which he never had acted to correct although it long had been posted for everyone to look at. Porter told White that he had just sat there on his rights and that they never were going to get past that in arbitration. From the research he had done, Porter declared that they could not win on the merits and that he was not going to waste the District's money by going into an arbitration that could not be won. In testimony, he explained that since an arbitration costs between $3000–$5000, every case could not be arbitrated. White had retorted that Porter should give him his letter immediately, he was going to take it to the Labor Board. White then obtained a copy of Porter's November 7 letter, described above, and left.

While conceding that, during the November 7 conversation, he did tell White that he did not pay any union dues for a long time, Porter denied that the Union had had any role in determining the seniority of White, of any other employee, or in posting seniority lists. These were company functions.

With respect to Billy White's description of a conversation he had had with Porter at a hardware store parking lot shortly after November 7, Porter testified that, while he probably encountered Billy White three to four times a week as he did just about everybody, and also possibly had seen Billy White in the hardware store's parking lot, he does not recall having had that conversation.

(2) Tiller's testimony

Company President Tiller testified that, on the advice of counsel, he took the position at the September 7 meeting that the grievance was untimely. He told White that he had been laid off because other men were on the job with more seniority. Tiller did not know when White first went to work for the Company because he already was working there when Tiller assumed control over the Company's operations. The records that could have provided that information had been

[23] Phillip White, on rebuttal, denied having met separately with Porter during or before the step-three grievance meeting. Phillip White emphasized that no one at the step-three meeting, including Porter, ever had told White that his grievance had not been filed on time, and that he first had seen the assertedly posted seniority lists for mines #32 and #4 when they were shown to him at the hearing in this matter.

[24] Sias confirmed Porter, testifying that White had not been mentioned or made the subject of any agreement when he, Adkins, and Bender had worked out the terms under which the electricians would be brought into the Union. Porter had been aware of and not objected to the agreement signed by Sias and Bender that the previously salaried electricians would keep their hire-in dates as their company seniority dates, but testified that he had not been a party to that accord and had not directed Sias.

taken by Federal investigators in the course of an inquiry concerning the prior owner, John Motton. The documents, if returned, had gone to Motton because, according to Tiller, records predating 1985 belonged to him. Tiller recalled that, at that meeting, after White had said that he wanted the Union to help him in this, he had told White that he might want the Union to help him now, but back when Tiller had taken over, he had not wanted the Union to represent him.

Tiller denied that he, or anyone else for the Company, had produced or referred to the two seniority lists during the step-three meeting, although familiar with them; or that Jimmy Adkins had told him about an unwritten agreement regarding White's seniority. Tiller, prior to the hearing in this matter, had not seen the account, signed by Adkins, and later by Bender, describing the agreements under which the electricians and White were brought into the Union.

Tiller admitted that, although he had known, or had reason to believe, that White had been running a continuous miner for Joshua since at least 1985, he was given seniority on the #32 mine seniority list only since 1988 when he joined the Union and started paying dues. It was then, in Teller's estimation, that White really became a classified employee. Tiller testified in this regard that ''[s]alaried people are not classified employees and the Union does not recognize them.'' Tiller could not confirm Bender's testimony that 5–10 percent of the employees on the Company's payroll at one time had been salaried, but averred that White's seniority dated not from when he began to do contract—classified work for the Company, but from the time he joined the Union and the Company began withholding his union dues. Tiller does not recall if he specifically discussed White's seniority with any local or District union representative.

Tiller explained that John Boling's name did not appear on the #32 mine seniority list although, when the list was prepared, he had been employed at that mine because Boling had been was salaried and not in the Union. This was so even though when Boling last worked at #32 mine, he was hourly paid. Tiller noted that Boling's name did appear on the #4 mine seniority list with an original hire date of July 1, 1985, relating back to when Boling was hired at salary. This was because of an arrangement to which he had agreed when Jimmy Adkins had wanted to put Boling and Castle into the Union with seniority from their dates of hire as done for the electricians. Because of the earlier agreement for the electricians, the U.S. Department of Labor, wage and hour division, had required the Company to pay thousands of dollars in back overtime wages. So, when Adkins had spoken to Tiller about putting Boling and Castle in the Union, an understanding was reached that the Union would not later demand that Joshua should give them back overtime pay which the Company at that time could not afford. However, during the discussion with Adkins concerning Boling and Castle, White's name never came up.

Tiller confirmed Porter's testimony that the Respondent District had had no input as to the seniority date he had given White or as to his decision to lay off White and the other employees from #4 mine in August 1990. Tiller agreed that it should not have been necessary to specifically provide in the agreements bringing employees into the Union that seniority would be protected since, under the contract, company seniority was established as the employees' date of hire regardless of when or how they joined the Union. However, Tiller also conceded that that was not the way things had happened in a situation that had been inherited and was not of his doing.

(3) The posting of seniority lists

Porter testified that miners were not notified of their seniority by mail, but by seniority lists posted on bulletin boards at the mines. Every experienced miner knew this and that they were responsible for checking their seniority. Should a miner disagree with his posted seniority, he could not ''let it lay up there'' for years without saying anything. Tiller confirmed that Tim Taylor, Joshua's office and business manager, had seen to it that the seniority list for #32 mine, the Company's only facilities at the time, were posted on a bulletin board that had a key-locked Plexiglas front, and which was located in that mine's office trailer. Tiller testified that the miners' change room was immediately next door to the office trailer and that employees always were moving through the office trailer to get tools, to pick up their pay checks, or to see whoever was in the office. The office, never locked, was open 24 hours a day. Also, notices of Saturday work, when available, were posted both inside the office door and in the change room. To enter the trailer, which was only 10-feet wide, employees had to pass the bulletin board. Tiller averred that Taylor had put up the #32 mine list in July 1988 and that he had seen that it still was posted when that mine closed.

According to Tiller, the seniority list for #4 mine was posted on a bulletin board in the small office located at one end of a house trailer at that facility. The list had been posted there at Tiller's direction by parts purchaser, Sam Belcher, where it remained from June 1990 until the end of January 1991, when the mine was closed. A tool and supply room occupied the middle of the trailer and the change room was at the other end. There was a small door separating the office from the tool and supply room and interconnecting change room, but the door mostly was open. Notices of Saturday work were posted in the middle of the trailer, but the seniority list was posted only on that office's bulletin board. While employees received their checks anywhere in the trailer that their supervisors, or Belcher, happened to be, including in the office, they had had to pass within 10 feet of the bulletin board holding the posted seniority list each day to go to work. Almost every employee would enter the office during a given week to look at the mine map posted on one wall, which they had to study to learn how to get out of the mine in the event of disaster. The other wall held the bulletin board. Tiller testified that he had seen Phillip White in the #4 mine office looking at the bulletin board.

Walter Marcum Jr. and Danny Callaway, both of whom had been employed at #4 mine until permanently laid off on January 28, 1991, when that mine closed,[25] confirmed, with differences of detail, that the seniority list identified for that mine had been posted for various intervals and at different places within the #4 mine trailer. Callaway recalled that the men had discussed the list and that a few of them had argued. The list had correctly indicated Callaway's seniority

[25] Marcum, originally laid off with White in August 1990, was recalled in November, and continued to work at #4 mine until closure.

and that of another named employee to whom he had spoken about the list.

(4) The relationship between Respondent District 17 and its local unions

Roger Caldwell, District 17 executive board member and director of its Subdistrict 3 office, the official to whom Porter reported, testified to the effect that District 17 and its subordinate local unions, including Local 5921 which had represented Joshua's employees at #32 mine, were separate and distinct entities. This was in effort to establish that Jimmy Adkins' testimony supportive of White, given while Adkins was an officer of Local 5921, would not be binding on the District. Caldwell testified that while District 17 performed many service functions for represented employees, grievance processing at the third step and arbitration were its main duties. While the collective-bargaining agreement took precedence over any local agreement, the District had no say over the local unions' affairs. Locals were self-governing bodies whose officials were elected or appointed independently of the District. Conversely, local union officials had no say over the District. Caldwell described locals as autonomous bodies with their own bylaws, but which were bound by the constitutions of the District and International Union.

Jimmy Adkins testified without contradiction that the Employer remitted dues to the District rather than to the International Union or local. The District, in turn, sent Adkins, as his local's financial secretary-treasurer, a monthly statement showing who had paid dues that month.

B. *Analysis and Concluding Findings*

In his Board-approved decision in *Oil Workers Local 8-398 (Gilbert Spruance Co.)*,[26] Administrative Law Judge Holley restated certain principles applicable herein:

> A labor union owes a duty of fair representation to all the employees it represents. *Vaca v. Sipes*, 386 U.S. 171 (1967). The union breaches the duty when in its conduct toward a member of the bargaining unit is arbitrary, discriminatory or in bad faith. Id. at 90. Although a union may not ignore a meritorious grievance or process it in a perfunctory fashion, a union is afforded broad discretion in deciding which grievances to pursue and the manner in which to handle them. *Associated Transport*, 209 NLRB 292 (1974). Mere negligence is insufficient to establish a breach of a duty of fair representation. *Plumbers Local 195 (Stone & Webster)*, 240 NLRB 504, 508 (1979).
>
> When . . . a union decides to process a grievance but decides to abandon it short of arbitration, a finding of violation turns not on the merit(s) of the grievance, but on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations. *Glass Bottle Blowers Local 106 (Owens-Illinois)*, 240 NLRB 324 (1979); *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995 (1986).

It also is settled that a union violates Section 8(b)(1)(A) and (2) of the Act when, with an employer, it maintains and enforces a contractual provision, or an oral agreement, contrary to the contract language, which accords seniority preference to employees based on union considerations, including date of membership in the union. This is because such conduct can cause, or be an attempt to cause, discrimination while unlawfully encouraging membership in the union.[27]

The factual pattern of this case makes clear, as Company President Tiller testified, that, contrary to the BCOA contract language establishing company seniority from the employees' dates of hire and mine seniority from assignment to a given mine, the Company and Respondent District had followed a practice of basing the seniority of classified employees on date of membership in the Union. Even without considering the statements to that effect attributed by General Counsel's witnesses to District field Representative Porter, the two written agreements to bring employees into the Union that are part of this proceeding tend to confirm this. The February 1988 settlement concerning the electricians, and that of April 1989, with respect to Boling and Castle, both specifically provide that the relevant employees would become covered by the BCOA contract, or brought into the classified work force, with seniority established by their dates of hire. If the participants to those settlements had had reason to anticipate that the BCOA contract language concerning seniority would be applied automatically, it should not have been necessary to separately negotiate and spell out arrangements to safeguard the affected employees' company seniority dates. Instead, as Jimmy Adkins and the then-mine superintendent and company co-owner, Bender, both testified, and set forth in their signed account, Bender, when approached by Adkins and Sias about putting the electricians in the Union, had found it necessary to expressly ask for and obtain Union agreement that these men be allowed to keep their dates of hire as their seniority dates. In fact, as Adkins testified, he and Sias did not agree immediately to Benders' seniority request, but promised to get back to him. The understanding concerning the electrician's seniority was finalized only during those parties' second meeting on the subject. Although the February 12, 1988 settlement that resulted, concerning the electricians' seniority, is phrased as an employer obligation, that ''the Employer agrees those Employee's [sic] seniority date(s) shall be established by their date(s) of hire in accordance with the terms of the Contract,'' the agreement, itself, stemmed from Bender's initiative. As noted, the seniority of Boling and Castle also was separately preserved in the written settlement that brought them into the Union. It is significant to note, in this context, that of all those salaried employees who, in 1988–1989, were brought under the contract's coverage, the seniority only of Phillip White, the one

[26] 282 NLRB 374, 376 (1986).

[27] *Cuneo Eastern Press of Pennsylvania*, 168 NLRB 523, 527–528 (1967); *Mine Workers District 23 (Peabody Coal)*, 293 NLRB 77, 78 (1989), enf. denied 921 F.2d 645 (6th Cir. 1990). It is noted that the decision of the court of appeals in *Peabody Coal*, supra, on which the Respondent District relies, differs from that of the Board. In *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984), the Board noted that the administrative law judge had ''improperly relied on courts of appeals decisions instead of initially considering relevant Board decisions on the issues presented'' and emphasized that ''it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed.'' *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). Accordingly, I am bound by the Board's precedent.

worker whose status was not put in writing, came into dispute.

Allen Adkins testified that, on two occasions, at a meeting with Porter and company representatives 1–2 days before White's August 12, 1990 layoff and again in private conversation with Porter immediately before the August 12 layoffs were announced, Porter replied to Adkins' protests that White was being laid off while John Boling, with less seniority, was permitted to remain at work, by stating that Boling was being allowed to keep his seniority as of his hire date because he had come into the Union voluntarily, while White would not be so permitted because he had joined the Union only under compulsion. When Allen Adkins, during their talk just before the layoff, told Porter that it did not make any difference whether or not White had been made to join the Union; he had come into the Union under the electricians' agreement, Porter replied that he did not care—that was the way it was going to be.

Phillip and Billy White testified that, when they went to Porter's office on August 16, 1990, to file the grievance, Porter, inter alia, had stated that White's seniority would count from the time he joined the Union and started paying union dues, and that Porter had made statements to the same effect at different times thereafter, including when, on about September 5, they had returned to his office with Jimmy Adkins' signed account of the genesis of the electricians' agreement;[28] during the September 7 third-step grievance meeting; on November 7, when he told the White brothers that the Union was not going to arbitrate Phillip White's grievance; and, shortly after November 7, when Porter and Billy White encountered each other in the hardware store parking lot.

This testimony of the White brothers generally was supported by Jimmy Adkins who described in detail the September 7 third-step meeting. Jimmy Adkins also related his role in preparing and signing the written account of the February 1988 meetings between Sias, Bender, and himself, requested by Phillip White when problems arose, that had resulted in the electricians and White being brought into the Union, all with original seniority specifically secured.

Porter, in turn denied the foregoing, asserting that White's grievance was fully pursued in good faith, that much time was spent in relevant research and consultation, but that the grievance could not be successfully arbitrated because there was no valid defense to the Company's argument that the grievance had not been timely filed. Porter argued that, not having previously known White, he had not had incentive to discriminate against him or to encourage the Company to so do, and he denied having said words to the effect that White's seniority, in any way, was related to the date he had joined the Union.

From the entire record, I credit Jimmy and Allen Adkins and Phillip and Billy White concerning their respective meetings and conversations with Porter where their testimony conflicts with that of Porter. Contrary to the Respondent's argument that the Adkins brothers testified as they did because they were friends of Phillip White, this was true only up to a point. The evidence is that Jimmy Adkins had initiated the process of bringing White into the Union which, when completed, cost White about $20,000 annually, representing the difference in his former salary and his hourly rated earnings under the contract for the same work and hours. From White's standpoint this was hardly a favor as was reflected in the additional time and effort Adkins and Bender required to get him to join. It also is undisputed that it was Allen Adkins who had called White's salaried status to Jimmy Adkins' attention, setting things in motion. Both Adkins brothers were active unionists and the record establishes no interest on their part in harming the District. While the Respondent District contends that Allen Adkins' March 1992 letters to the local newspaper and to Roger Caldwell, expressing dissatisfaction over how Porter had been representing the employees in matters unrelated to the present case, indicated bias and prejudice predating the hearing, these actions just as readily could illustrate that others besides Phillip White had had reason to question Porter's ability and/or willingness to fairly and effectively represent the employees. There is no evidentiary basis or need to resolve questions raised by these letters in order to reach a determination herein.

Jimmy Adkins, with no personal stake in the outcome, was the most disinterested witness to testify in this proceeding. As an officer of Local 5921, he could not have enhanced his standing within the Union by testifying on White's behalf. Nonetheless, having arranged in good faith to have White brought into the Union, at financial loss but with original seniority intact, his further efforts to ensure that White would receive this personally promised benefit on becoming a union member was in fulfillment of an obligation arising from the same transaction.[29]

While, as the Respondent District contends, the District and its subordinate local unions may have been autonomous bodies to some extent, I find, under agency principles, that the testimony of Jimmy Adkins, as financial secretary-treasurer of Local 5921, UMWA, constituted admission binding on the Respondent District. In *Mine Workers (Garland Coal Co.)*,[30] Administrative Law Judge Pollack, in his Board-approved decision, found as follows:

> Respondents correctly argue that Respondent Local and Respondent District are legal entities apart from Respondent International and that Respondent International is not automatically responsible for the acts of its affiliates. See, e.g., *Coronado Co. v. United Mine Workers of America*, 268 U.S. 295, 299 (1925); *International Brotherhood of Electrical Workers, AFL–CIO (Franklin Electric Construction Company)*, 121 NLRB 143, 147 (1958). However, the basis for holding Respondent responsible for the acts of its subordinates is based not on affiliation but rather is based on its dele-

[28] As described by Billy White.

[29] I do not credit Sias' denial of this testimony by Adkins and Bender that an arrangement had been made concerning White's seniority at the same time as that for the electricians. Sias' version, if accepted, would not account for the impetus created at the time that ultimately compelled White to join.

[30] 258 NLRB 56, 58 (1981). Also see *Mine Workers Local 1373 (Island Creek Coal Co.)*, 186 NLRB 361, 364 (1970), where, construing the similar language of an earlier BCOA contract, the Board, in relevant part, held that, ''It is clear that under its terms, Local 1373 was made the agent of the International in regard to local matters such as grievances and local disputes;'' and *Steelworkers (Memphis Folding Chairs)*, 258 NLRB 484, 487 fn. 10. (1981).

> gation of its contractual and statutory duties for the enforcement of its contract to Respondent District and the mine committee. Having delegated its contractual and statutory duties to the mine committee and Respondent District, Respondent International created an agency. It cannot now disavow its agents' actions. . . . This is particularly true where, as here, the agents were acting within the scope of their delegated authority. Simply stated, Respondent International delegated its duties under the contract but did not, and could not, delegate its responsibilities [footnote omitted].

The above cases establish that in circumstances applicable here, where the International is signatory to the collective-bargaining agreement, but has ordained that the processing of grievances be shared between its Districts and the District's subordinate local unions, under which the locals handle grievances and immediate area disputes through the first two steps of the grievance procedure and the Districts through the third and possible fourth (arbitral) step, a local may become the agent of the International even though both are separate legal entities. This is not because of affiliation, but because the local was acting as the International's agent in performing certain delegated duties that were the International's responsibilities. While these cases do not speak directly to establishing the local union as the agent of the local's District, there appears to be no meaningful distinction that would preclude such agency application from being so extended to the Districts, as well. Under the existing shared arrangement, the local, in processing and resolving grievances at the immediate level, also acts as the agent of its parent District, providing within the District's territorial jurisdiction, the same delegated services which, within the International's larger jurisdiction, provided rationale for the District, in cited cases, to be held an agent of the International. It is relevant that Jimmy Adkins, in fact, did function in this matter in his official capacity as a local union officer in a manner beneficial to the District. In acting to have Phillip White and the other salaried workers brought into the Union, he increased the number of dues-paying employees whose remittances, the record shows, were paid, not to the local, but to the District. The District, in turn, merely sent the local's officials a monthly report listing the paid-up employees.

In real terms, the locals and districts, in their respective roles of processing grievances that proceeded beyond the second step, had a closer functional interrelationship than did either with the International, since that body did not become involved directly with the grievance procedure. Accordingly, I find that Jimmy Adkins, in helping to bring about of an agreement to enroll White in the Union; in his efforts to ensure that that agreement, including the protection of White's seniority, was fully implemented; and in his testimony herein describing those efforts, acted as agent of both Local 5921, of which he was an officer, and of the Respondent District. Accordingly, I find that Adkins' credited testimony as to what occurred at the step-three meeting on September 7 may be considered an admission by and against the District. However, even if it ultimately should be found that Jimmy Adkins' testimony is not binding on the District because such agency did not exist, for reasons stated above, including Tiller's testimony and the repeated need to separately act to preserve the seniority of the electricians, Boling and Castle, instead of relying on the contract language, I still would credit Jimmy and Allen Adkins and Phillip and Billy White.[31]

For the above reasons, I find that the Respondent District, by Porter, violated Section 8(b)(1)(A) and (2) of the Act both by maintaining and enforcing an oral agreement basing employee seniority upon duration of membership in the Union and by enforcing that agreement to cause Phillip White's layoff on August 12, 1990.[32] I further find that the Respondent District violated Section 8(b)(1)(A) of the Act by refusing to arbitrate White's grievance because of his earlier nonmembership in the Union and/or his reluctance to become a union member and by telling Phillip White on August 16, September 7, and November 7, 1990, that his grievance lacked merit because, in effect, his seniority with Joshua did not begin until he became a member of the Union.

In White's case, it is noted that his company seniority, rather than his mine seniority at #4 mine, should have governed his order of layoff. This was because, although White did not report to work at #4 mine until he later was transferred there after his ''pillaring out'' assignment at #32 mine had ended, his seniority at #4 mine, and that of others, was arranged in the agreement reached at the February 20, 1990, step-three meeting resolving mine committeeman Johnny Williams' grievance. According to Jimmy Adkins' uncontradicted testimony, the Company there agreed that it would fill the available jobs at #4 mine, which then was opening, with employees still working at #32 mine. Once there, the former #32 mine employees would regain their mine seniority to the first day of #4 mine's operation. When an employee asked what would happen in the event of layoff, since all employees would have the same mine seniority, Porter had replied, in effect, without company challenge, that if there was a layoff, company seniority would prevail. Accordingly, when layoffs at #4 mine later became relevant, White, with his early date of hire at the Company, should have been protected.

In reaching the above conclusions, contrary to the General Counsel and the Charging Party, I accept the testimony of Porter, supported by Tiller, and to varying degrees by Marcum and Callaway, that the seniority lists were conspicuously posted at mines #32 and #4, at least to an extent that Phillip White and other classified employees could and/or should, have had current knowledge of accredited seniority. Since everything from job benefits to layoff, recall and, in practice, transfer rights in a relatively unstable employment environment, were based on some form of seniority, employee knowledge of their seniority, not only as to their own particular dates but in relation to the other workers, was of fundamental importance. This was true not only with respect

[31] Porter's inability to recall whether, during a chance meeting in a hardware store parking lot shortly after November 7, he had responded in questionable fashion to Billy White's further protests over the Union's previously announced refusal to arbitrate his brother's grievance, is not as convincing as Billy White's cogent description of that event. Billy White's account therefore is accepted.

[32] Contrary to the Respondent District's contention that there is no evidence that it had an oral agreement with the Company that could adversely affect White's seniority, from the credited evidence, Porter, at the September 7 meeting, had agreed with the appropriateness of Tiller's stated course in having assigned White seniority based on when he had become a union member and started to pay dues.

to Phillip White, but as to all employees at both mines during their respective periods of operation. The record shows that employees discussed and argued over their posted seniority dates and it is difficult to conceive that the employees as a group would have tolerated the withholding of such information. Although Bender testified that he, in fact, had not posted seniority lists while mine superintendent, Bender had left the Company by mid summer 1988, 2 years before Phillip White's layoff. Accordingly, Bender's testimony in this regard predates the relevant period and does not directly contradict Tiller's statement that, after he assumed active management of Joshua in July 1988, he took measures to ensure that seniority lists were prominently posted at both mines.

Having found that Phillip White either did have, or should have had, timely knowledge of his ascribed seniority from posted lists at both mines #32 and #4, I further find, contrary to the General Counsel, that Tiller did raise the issue of the grievance's untimeliness at the step-3 meeting at which time that contention was discussed. It is most unlikely that the markedly late filing date of the grievance in terms of posted seniority would not have been noted. Accordingly, it might have followed, as contended by Porter and Tiller, that White's grievance was not arbitrable because, based on that consideration, untimely filed. Were this the only factor here, that could have been the case since Porter's description of his efforts to get around the company raised issue of untimeliness was convincingly detailed.

However, the Respondent District's ability to fairly represent White in this grievance was materially compromised by its above found oral agreement with the Company to date seniority to when the employees became members of the Union. Any effort by the Respondent District to pursue White's grievance would have put it in conflict with its own relevant policy and practice which benefited the Respondent District by unlawfully encouraging employees to join the Union as prerequisite to obtaining seniority. This conflict of interest effectively tainted the Respondent District's ability to fairly represent White in a grievance that essentially protested that practice. In this context, since the Respondent District had participated in creating a situational contrariety whereunder it could not have fairly represented White, or any classified employee, in a grievance that called into question its arrangement of basing seniority upon when employees joined the Union, as to the Respondent District, the timeliness of White's grievance is irrelevant. The complaint in this matter alleges the unlawfulness of the union-company seniority arrangement, of which the Respondent District's also alleged failure to arbitrate is symptomatic. As stated in *Auto Workers Local 600 (Dearborn Stamping Plant)*:[33]

> It is axiomatic that an exclusive bargaining representative is required to afford fair and unbiased representation to all unit members. *Steele v. Louisville & Nashville Railroad Co., et al.*, 323 U.S. 1192, 202, 203 (1944). While an individual's grievance may be rejected for the greater good of the entire unit, the contrary action cannot be regarded as valid. See *Vaca v. Sipes*, 386 U.S. 171, 190–191 (1967).

Cominco-American, Inc.,[34] and *Kramer Bros. Freight Lines*,[35] cited by the Respondent District, are distinguishable from the present situation. In *Cominco-American*, supra, six employees were transferred from one of the Employer's mine groups (Brock) to another (Douglas). The Employer had had separate collective-bargaining agreements with different labor organizations for the employees at each mine group. The six employees later were transferred back to Brock where, under the Brock contract, they had and were given, full company seniority. The Company then, at the Union's demand, agreed to change the contract to provide at the Brock mines for mine seniority rather than company seniority. The six transferees' seniority thereby was reduced and they, thereafter, were discharged. The Board, in dismissing the complaint, found that the Respondent Company and Union ''did not apply any arbitrary or discriminatory criteria in keying the complainants' seniority, and subsequent layoff, to their length of service within the unit.'' Here, unlike *Cominco-American*, the relating of Phillip White's seniority to his service within the unit, or time as a union member, was discriminatory since the other salaried employees who likewise were brought into the Union—the electricians, Boling and Castle—were allowed to retain their dates of hire as their respective company seniority dates while White, for no valid distinguishing reason, was not.

Kramer Bros. Freight Lines, supra, is even less apropos. The complainant employees in Kramer during the periods for which lost seniority was claimed, by agreement between Employer and Union, were constituted a ''special group of checkers who were not precluded by their loyalty to their fellow employees and fellow union-members from concentrating exclusively on the interests of the Company.'' Accordingly, these company checkers, who checked off incoming freight being unloaded, filled positions and performed clerical work that intentionally had been removed from the unit. Unlike other unit employees, they did no manual labor and also functioned as ''pushers'' or ''straw bosses.'' The Board majority found, inter alia, that when the Employer later changed its method of operation, ending the clerical checker's classification and requiring that those who had performed that function thereafter handle freight and do manual labor like the other employees, the Union, in the absence of any discriminatory conduct, had validly defended the seniority of employees who had been working within the unit all along by seeking to relate the seniority of the former clerical checkers to when they finally entered the unit. Unlike the former clerical checkers who previously had not performed unit work and who had been intentionally excluded from the unit, by agreement, so that they could better represent the Employer's interest, White, during his employment, always had performed contract-classified work at a unionized mine. Under the terms of the BCOA agreement, White, who had had no nonunit duties or responsibilities, should have been

[33] 225 NLRB 1299 (1976). In *Dearborn Stamping Plant*, supra, the conflict that violated Sec. 8(b)(1)(A) of the Act was based on the Respondent Union's conduct in having permitted a unit chairman, as its agent, process a grievance on behalf of committeemen in a matter where the respective interests of the processing official and the grievants were diametrically opposed. The grievance charged that the officiating unit chairman had allocated to himself overtime work which he previously had shared with the grieving committeemen.

[34] 182 NLRB 638 (1970).

[35] 130 NLRB 36 (1961).

accruing seniority during his entire time with Joshua Industries.

CONCLUSIONS OF LAW

1. Joshua Industries, Inc., at all material times, was an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent District is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing an agreement with the Employer, Joshua Industries, Inc., basing seniority upon duration of membership in the Union and by enforcing that agreement to cause Phillip White's discharge, the Respondent District respectively violated Section 8(b)(1)(A) and (2) of the Act.

4. By informing Phillip White on three occasions that he could be laid off because his seniority did not begin until he became a member of the Union and by refusing to process to arbitration the grievance concerning White's layoff because for much of his employment with the Employer he had not been a member of the Union and/or had been reluctant to join, the Respondent District respectively violated Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Phillip White was discriminatorily laid off because of the Respondent District's unlawful conduct for which, as the Board previously found in its above August 20, 1992 Order affirming *Joshua Industries*, Case 9–CA–28151, JD–193–92, that Employer also was responsible in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that the Respondent District, jointly and severally with Joshua Industries, Inc., be required to make White whole for any loss of earnings incurred as a result of the discrimination against him, with backpay to be computed as prescribed in *F. W. Woolworth Co.*,[36] and with interest as set forth in *New Horizons for the Retarded*.[37] As the record indicates that the Employer herein closed its only remaining operating facility, #4 mine, on January 28, 1991, when it went into Chapter 7 bankruptcy, the period for which backpay is due should run from August 12, 1990, until January 28, 1991, subject to such adjustment as may be indicated at the compliance stage of this proceeding.

Finally, the Respondent District should be required to notify Joshua Industries, Inc., in writing, with a copy to Phillip White, that it has no objection to White's employment with seniority applied as of his date of original hire by that Employer, and that it will stop interpreting the provisions of the successive National Bituminous Coal Wage Agreements relating to seniority, layoff and recall, in manner that discriminates against the seniority of classified employees because of their nonmembership in the Union and/or reluctance to become union members.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, District 17, United Mine Workers of America, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Encouraging membership in District 17, United Mine Workers of America, or any other labor organization, by maintaining and enforcing agreements with employers that base the seniority standing of employees upon the date they became union members.

(b) Causing employers to reduce the seniority of, and to lay off, their employees in order to conform to seniority standings based on when such employees became union members.

(c) Informing employees that they were subject to layoff because their seniority did not begin until they became union members.

(d) Failing and refusing to process employee grievances to arbitration because the said employees had not been union members and/or had been reluctant to become union members.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Joshua Industries, Inc., make Phillip Lee White whole, with interest, for any loss of pay or other benefits he may have suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Notify Joshua Industries, Inc., in writing, with a copy to Phillip Lee White, that the Respondent District has no objection to its employment of Phillip Lee White with seniority applied from his initial date of employment by that Employer, and that it will stop interpreting the provisions of the relevant collective-bargaining agreement relating to seniority, layoff, and recall, in manner that discriminates against the seniority of classified employees because of their nonmembership in the Union and/or reluctance to become union members.

(c) Post at its union offices, or hiring halls in the State of West Virginia, copies of the attached notice marked ''Appendix.''[39] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places

[36] 90 NLRB 289 (1950).

[37] 283 NLRB 1173 (1987).

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent District to ensure that the notices are not altered, defaced, or covered by any other material. In the event that Joshua Industries' #4 mine no longer is in operation, the Respondent District 17, immediately upon receipt, shall mail copies of the aforesaid notice, signed and dated by its authorized representative, to all unit employees employed by that Employer during the 6-month period immediately prior to the date of the closing of the facility, at their last known addresses.

(d) Notify the Regional Director for Region 9 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT encourage membership in District 17, United Mine Workers of America, or any other labor organization, by maintaining and enforcing agreements with employers that base the seniority standing of employees upon the date they became union members.

WE WILL NOT cause Joshua Industries, Inc., or any other employer, to reduce the seniority of, and to lay off, their employees in order to enforce seniority standings based on when such employees became union members.

WE WILL NOT inform employees that they are subject to layoff because their seniority did not begin until they became union members.

WE WILL NOT refuse to process employee grievances to arbitration because the said employees had not been union members and/or had been reluctant to become union members.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL, jointly and severally with Joshua Industries, Inc., make Phillip Lee White whole, with interest, for any loss of pay or other benefits he may have suffered as a result of the discrimination against him.

WE WILL notify Joshua Industries, Inc., in writing, with a copy to Phillip Lee White, that we have no objection to its employment of Phillip Lee White with seniority applied from his initial date of employment by that Employer, and that WE WILL stop interpreting the provisions of the National Bituminous Coal Wage Agreement relating to seniority, layoff and recall, in manner that discriminates against the seniority of classified employees because of their nonmembership in the Union and/or reluctance to become union members.

DISTRICT 17, UNITED MINE WORKERS OF AMERICA